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No. 03-357

IN THE SUPREME COURT OF THE UNITED STATES

DERRAL G. ADAMS, Warden; C.A. TERHUNE, Director, California Department of Corrections, *Petitioners,*

v.

MICHAEL D. BRAMBLES, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Derral G. Adams, Warden of California Substance Abuse Facility at Corcoran, California, and C.A. Terhune, Director of the California Department of Corrections (collectively "the State"), respectfully submit this reply to petitioner Michael D. Brambles's opposition to the petition for writ of certiorari ("the opposition"). In the petition, the State seeks review on two questions: (1) Is dismissing a mixed petition under *Rose v. Lundy*, 455 U.S. 509, 522 (1981), improper unless the district court first offers to stay the federal proceedings pending exhaustion of state remedies and advises that the period of limitation would bar a future petition?; and (2) May the period of limitation be equitably tolled because a prior district court dismissed a mixed habeas petition after the period expired without offering to stay the petition pending exhaustion and advising that the period would bar a future petition?

A. *Rose v. Lundy*

This Court has unequivocally and repeatedly held that "a district court *must* dismiss habeas petitions containing both

unexhausted and exhausted claims." *Rose v. Lundy*, 455 U.S. 509, 522 (1981) (emphasis added); *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Castille v. Peoples*, 489 U.S. 346, 349 (1989); *Teague v. Lane*, 489 U.S. 288, 325 (1989) (Stevens, J., concurring); *Engle v. Isaac*, 456 U.S. 107, 124 n.25 (1982). Nonetheless, as to the first question presented, Brambles argues that *Rose v. Lundy* is actually consistent with the holding in this case because *Rose* considered the habeas statute before the 1996 enactment of the one-year period of limitation codified at 28 U.S.C. § 2244(d), and this case considered the new habeas statute. He alleges that "*Rose* was based upon the premise that a petitioner would have the ability to dismiss and refile." (Opp'n at 2-5.) Brambles's argument affirms the need for this Court's review of this issue. Although the State disagrees with Brambles's conclusion that federal courts need no longer follow *Rose*, the State agrees that the enactment of the period of limitation in 1996 is an intervening fact that has engendered a circuit split of authority on this issue. *Compare Brambles v. Duncan*, 330 F.3d 1197, 1203 (9th Cir. 2003), *Zarvela v. Artuz*, 254 F.3d 374, 380 (2d Cir. 2001), and *Freeman v. Page*, 208 F.3d 572, 577 (7th Cir. 2000), *with Warren v. Garvin*, 219 F.3d 111, 114-15 (2d Cir. 2000), *Victor v. Hopkins*, 90 F.3d 276, 282 (8th Cir. 1996), and *Sterling v. Scott*, 57 F.3d 451, 454 (5th Cir. 1995).

An Eighth Circuit case, issued on the day the State's petition was filed, *Akins v. Kenney*, 341 F.3d 681 (8th Cir. 2003), further underscores this split of circuit authority. In *Akins*, the Eighth Circuit addressed a habeas petitioner's claim that the district court should have stayed his mixed petition while he exhausted his newly-presented claims because the AEDPA's one-year period of limitation had lapsed while his petition was pending in federal court. *Id.* at 685. The court noted in reviewing the claim that "absent a stay or equitable tolling, Akins will be unable to return to federal court following exhaustion of his state court remedies." *Id.* The court nevertheless rejected the petitioner's contention, explicitly

disagreeing with the holding of this case:

> Several circuits have concluded that a stay is required or is reasonable in cases of mixed habeas petitions where a dismissal would "jeopardize the petitioner's ability to obtain federal review" in light of AEDPA's one-year statute of limitation. *Nowaczyk* [*v. Warden, New Hampshire State Prison*], 299 F.3d [69,] . . . 79 [(1st Cir. 2002)]; *see also Brambles v. Duncan*, 330 F.3d 1197, 1203 (9th Cir. 2003); *Palmer v. Carlton*, 276 F.3d 777, 781 (6th Cir. 2002); *Zarvela v. Artuz*, 254 F.3d 374, 380 (2d Cir. 2001), *cert. denied*, 534 U.S. 1015 . . . (2001); *Freeman v. Page*, 208 F.3d 572, 577 (7th Cir. 2000), *cert. denied*, 531 U.S. 946 (2000). Justice Stevens stated in his concurring opinion in *Duncan* [*v. Walker*, 533 U.S. 167] that "although the Court's pre-AEDPA decision in *Rose v. Lundy* prescribed the dismissal of federal habeas corpus petitions containing unexhausted claims, in our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies." *Duncan*, 533 U.S. at 182-83 . . . (Stevens, J., concurring in part and concurring in the judgment) (citation omitted).
>
> While this view may be the "growing consensus," *Nowaczyk*, 299 F.3d at 79, it has not yet been adopted by a majority of the members of the Supreme Court or by this circuit. Absent contrary controlling Supreme Court authority, we are bound to follow our own precedents and the Supreme Court's view as expressed in *Rose v. Lundy*. We have held, post-AEDPA, that "a district court has no authority to hold a habeas petition containing unexhausted claims in abeyance absent truly exceptional circumstances,

> such as when state remedies are inadequate or fail to afford a full and fair adjudication of federal claims, or when exhaustion in state court would be futile." *Carmichael v. White*, 163 F.3d 1044, 1045 (8th Cir. 1998) (citing *Victor v. Hopkins*, 90 F.3d [at 279-80 & n.2, 282 . . .]). Habeas petitioners who delay filing for state postconviction relief "should be held responsible for their failure to fulfill the long-standing requirement that they exhaust state remedies." *Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001). Akins has asserted unexhausted claims and there is no showing that it would be futile for him to pursue his available state court remedy, which he would have been wise to pursue in the first instance. We cannot conclude that the district court abused its discretion in not granting a stay *sua sponte*. *See Thompson v. Sec. for Dep't of Corr.*, 320 F.3d 1228, 1229-30 & n.3 (11th Cir. 2003) (holding district court did not abuse its discretion by dismissing mixed petition in spite of petitioner's argument that he had no choice but to file a mixed petition in order to meet the one-year filing deadline of AEDPA and preserve federal review for the exhausted claims).

Id. at 685-86.

As in *Akins*, the one-year limitation period lapsed while Brambles pursued his unexhausted claims in district court. The district court, however, was "bound to follow . . . the Supreme Court's view [requiring dismissal of mixed petitions] as expressed in *Rose v. Lundy*." *Akins*, 341 F.3d at 686; *see also Duncan v. Walker*, 533 U.S. 167, 178-80 (2001). As Second and Fifth Circuit law is also contrary to Ninth Circuit law on this issue (*see* Pet. for Writ of Cert. at 8-12), the Ninth Circuit's holding is in direct conflict with the holdings of this Court and at least three other circuit courts of appeals.

B. Equitable Tolling

The State made two arguments in support of the second question presented in the petition for writ of certiorari: (1) the period of limitation is not subject to equitable tolling; and (2) in any event, equitable tolling would not be present based on a prior district court's failure to offer to stay and abey a mixed petition and notify the petitioner that a future petition would be time-barred. (Pet. for Writ. of Cert. at 13-18.) In the opposition, Brambles asserts that the State waived its first argument, that the AEDPA's period of limitation cannot be equitably tolled:

> Petitioner raises this new issue for the first time on this appeal, which may not be done. In its brief, and at oral argument, petitioner conceded equitable tolling may occur, as to the statute of limitations involved herein, [and] merely contended such theory does not apply in this case.

(Opp'n at 6 n.1.) The State disagrees.

It is true that the State did not argue in the Ninth Circuit that the limitation period was not subject to equitable tolling and instead argued that equitable tolling should not apply in this circumstance, applying the established Ninth Circuit test for equitable tolling under 28 U.S.C. § 2244(d). Brambles, however, mischaracterizes the State's omission of argument on this settled point of circuit law as a concession; the State never "conceded" that 28 U.S.C. § 2244(d) was subject to equitable tolling, either in its briefs or at oral argument.

The State may raise that threshold argument now. Supreme Court Rule 14(a) provides, "Only the questions set out in the petition [for writ of certiorari], *or fairly included therein*, will be considered by the Court." Emphasis added. Although this Court ordinarily does not consider an *issue* not raised below, it has long held that a party may raise a new *argument* in

support of that issue. *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995); R. Stern & E. Gressman, Supreme Court Practice §§ 6.25, 6.26, pp. 415-16, 421 (8th ed. 2002).

In *Lebron*, the petitioner "expressly disavowed" an argument in the lower courts, but argued in his merits brief in this Court that Amtrak was a government entity under the First Amendment. 513 U.S. at 379. In the lower courts and in his certiorari petition, petitioner had claimed only that Amtrak was a private entity closely connected to the government. *Id.* This Court concluded that whether Amtrak was a "government entity" was "fairly included" in the question set forth in the petition. *Id.* at 379-80. The Court explained that

> it is quite impossible to consider whether the Government connections are sufficient to convert private-entity Amtrak into a Government actor without first assuming that Amtrak is a private entity. . . . The question of private-entity status is, in other words, a *prior* question.

Id. at 381; *see also Cuyler v. Sullivan*, 446 U.S. 335, 342 n.6 (1980) ("[s]ince resolution of this question of law is a 'predicate to an intelligent resolution' of the question on which we granted certiorari, [citation], we must address it").

Similarly, here, the question of whether there is equitable tolling when a prior district court fails to stay a mixed petition fairly includes the question of law of whether the AEDPA's period of limitation is subject to equitable tolling. One cannot decide the former question without assuming an affirmative answer to the latter. The State's argument that the limitation period is not subject to equitable tolling does not raise a new issue but merely a new argument to support what has been the State's consistent claim, that Brambles is not entitled to equitable tolling of the period of limitation. Furthermore, the State never disavowed this argument below. In addition, the

State is raising this particular argument in the certiorari petition, not for the first time in a merits brief before this Court.

Moreover, five years before the State's briefing below, the Ninth Circuit held that the limitation period could be equitably tolled and explicitly rejected the very argument that the State now seeks to make in this Court regarding the existence of equitable tolling. *Calderon v. United States District Court (Beeler)*, 128 F.3d 1283, 1287-89 (9th Cir. 1997), *reh'g and reh'g en banc denied* (1997), *overruled on another ground, Calderon v. United States District Court (Kelly)*, 163 F.3d 530, 540 (9th Cir. 1998) (*en banc*); *see also Kelly*, 163 F.3d at 535 (recognizing "our holding that this limitations period can be equitably tolled in the proper circumstances"); *id.* at 545 (Hall, J., dissenting) ("*Beeler* expressly held (a holding that the en banc majority does not disturb) that the AEDPA's statute of limitations was not jurisdictional"). Thus, the Ninth Circuit had already "passed upon" and rejected this particular legal argument at the time of this case. *United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001). Therefore, it was unnecessary to redundantly remake the argument in the Ninth Circuit.

Brambles also argues that equitable tolling is appropriate because the prior district court did not sufficiently "help" him. He argues that pro se prisoners like himself "simply do not know, nor understand, what procedural requirements are involved; untrained and without counsel's guidance." (Opp'n at 8-10.) This Court, however, has insisted on a total exhaustion rule even for petitioners unrepresented by counsel, explaining, "Just as *pro se* petitioners have managed to use the federal habeas machinery, so too should they be able to master this straightforward exhaustion requirement." *Rose v. Lundy*, 455 U.S. at 520. If the period of limitation potentially impacts this black letter law, it is for this Court, not the Ninth Circuit, to make the change. *See Akins*, 341 F.3d at 686 ("[a]bsent contrary controlling Supreme Court authority, we are bound to follow our own precedents and the Supreme Court's view as

expressed in *Rose v. Lundy*").

Brambles's other arguments purport to distinguish several cases on equitable tolling that the State cited in its petition. (Opp'n at 5-9.) Rather than weigh down this certiorari reply brief with retorts to Brambles's merits arguments, suffice it to reemphasize:

> [S]ection 2244(d) comprises six paragraphs defining its one-year limitations period in detail and adopting very specific exceptions. Congress likely did not conceive that the courts would add new exceptions and it is even more doubtful that it would have approved of such an effort. [Citation.] AEDPA reflects Congress' view that the courts were being too generous with habeas relief and that the whole system needed to be tightened up.

David v. Hall, 318 F.3d 343, 346 (1st Cir. 2003); *see also Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999) ("[g]iven this and other express tolling provisions (28 U.S.C. §§ 2244(d)(1)(B), (C), (2)), it is unclear what room remains for importing the judge-made doctrine of equitable tolling"). Accordingly, extension of the one-year period set forth in the AEDPA by equitable tolling is "unwarranted," *see United States v. Beggerly*, 524 U.S. 38, 49 (1998), and "unnecessary," *see Lampf v. Gilbertson*, 501 U.S. 350, 363 (1991).

The second question presented is an unresolved one impacting the vitality of the two major statutory procedural defenses to habeas corpus petitions: untimeliness and unexhaustion. (*See* Pet. for Writ of Cert. at 13-18.) And nothing in petitioner's opposition even purports to contradict that seven members of this Court have recognized that it remains an open question whether equitable tolling exists when the period of limitation expires during the pendency of a prior mixed habeas petition. *Duncan v. Walker*, 533 U.S. at 181; *id.* at 182 (Souter, J., concurring); *id* at 182-83 (Stevens, J.,

concurring). (*See* Pet. for Writ of Cert. at 12-13.) This Court in *Duncan* expressly reserved the question of equitable tolling because the prior district court dismissed the petition *before* the limitation period expired. *Duncan*, 533 U.S. at 181-82. Here, by contrast, the prior district court dismissed the mixed petition *after* the limitation period expired. (Pet. for Writ of Cert., App. A-6.) Therefore, this Court can resolve this significant question in this case.

CONCLUSION

This Court should grant the petition for writ of certiorari.

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Respectfully submitted,

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